THE DECALOGUE JOURNAL

A PUBLICATION OF THE DECALOGUE SOCIETY OF LAWYERS

Volume 7 NOVEMBER - DECEMBER, 1956 Number 2

Civil Liberties and Human Rights

. . . Man, as he emerged, was not prodigally equipped to master the infinite diversity of his environment. Obviously, enough of us did manage to get through; but it has been a statistical survival, for the individual's native powers of adjustment are by no means enough for his personal safety, any more than are those of other creatures. The precipitate of our experience is far from absolute verity; and our exasperated resentment at all dissent is a sure index of our doubts. Take, for instance, our constant recourse to the word, "subversive," as a touchstone of impermissible deviation from accepted canons. All discussions, all debate, all dissidence tends to question, and in consequence to upset, existing convictions: that is precisely its purpose and its justification. He is, indeed, a "subversive" who disputes those precepts that I most treasure and seeks to persuade me to substitute his own. He may have no shadow of desire to resort to anything but persuasion; he may be of those to whom any forcible sanction of conformity is anathema; yet it remains true that he is trying to bring about my apostasy, and I hate him just in proportion as I fear his success. Contrast this protective resentment with the assumption that lies at the base of our whole system that the best chance for truth to emerge is a fair field for all ideas. Nothing, I submit, more completely betrays our latent disloyalty to this premise, to all that we pretend to believe, than the increasingly common resort to this and other question-begging words. Their imprecision comforts us by enabling us to suppress arguments that disturb our complacency, and yet to continue to congratulate ourselves on keeping faith as we have received it from the Founding Fathers.

Heretics have been hateful from the beginning of recorded time; they have been ostracized, exiled, tortured, maimed and butchered; but it has generally proved impossible to smother them; and when it has not, the society that has succeeded has always declined. Facades of authority, however imposing, do not survive after it has appeared that they rest upon those sands of human conjecture and compromise. And so, if I am to say what are "the principles of civil liberties and human rights," I answer that they lie in habits, customs—conventions, if you will—that tolerate dissent, and can live without irrefragable certainties; that are ready to overhaul existing assumption; that recognize that we never see save through a glass, darkly; and that at long last we shall succeed only so far as we continue to undertake "the intolerable labor of thought"—that most distasteful of all our activities. If such a habit and such a temper pervade a society, it will not need institutions to protect its "civil liberties and human rights"; so far as they do not, I venture to doubt how far anything else can protect them: whether it be Bills of Rights, or courts that must in the name of interpretation read their meaning into them. . . .

JUDGE LEARNED HAND
from THE FREEDOM READER

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IN THIS ISSUE

The Editor will be glad to receive contributions of articles of modest length, from members of The Decalogue Society of Lawyers only, upon subjects of interest to the profession. Communications should be addressed to the Editor, Benjamin Weintroub, 82 West Washington Street, Chicago 2, Illinois.

DECALOGUE LEGAL EDUCATION COMMITTEE SCHEDULES SERIES OF FOURTEEN LECTURES

The series of fourteen lectures initiated in October by the Decalogue Society Committee on Legal Education is proceeding according to announced schedule. The lectures are held on Wednesdays at 4:00 P.M. in the Society's offices at 180 W. Washington Street. Admission is free.

The lectures embrace the following subjects: Social Security; Income Tax; Immigration and Naturalization; Divorce and Domestic Relations; Bankruptcy; Fraud Labor Relations.

Lectures already held include: Social Security, Jack E. Dwork; The Net Worth Doctrine in Tax Fraud Cases, Joseph Solon; Recurring Problems in Estate Planning, Paul G. Annes; Impact of Federal Taxes on Real Estate Transaction, Charles Melvoin; Highlights of Deportation Procedure, William Greenhouse and John M. Weiner; Current Developments in Matrimonial Law in the United States—with Emphasis on Illinois, Meyer Weinberg; Trial Technique in Matrimonial Matters, Sol R. Friedman.

FORTHCOMING LECTURES

December 12, Miss Matilda Fenberg: Proposed Uniform Divorce Bill and other Related Statutes.

January 16, Archie H. Cohen: The Social and Economic Value of the Bankruptcy Act—Scope of the Act.

January 23, Norman H. Nachman: Arrangements Under Chapter 11.

January 30, Theodore D. Kahn: The Question of Reasonable Fees For Legal Services in Bankruptcy Cases.

February 6, Bernard H. Sokol: Current Problems in Tax Fraud Cases.

February 13, O. D. Zimring: Legal and Economic Aspects of Labor Arbitration.

February 20, Alderman Leon M. Despres: Legal Problems of Collective Bargaining.

Members are invited to avail themselves of an unusual opportunity to learn the latest developments of law in various aspects of legal practice and jurisprudence. Lawyers long known as experts in their respective fields, all members of our Society, invite your attendance and participation in the series. A question period follows the conclusion of each lecture.

The lectures are under the auspices of the Decalogue Legal Education Committee Solomon Jesmer chairman, Alec E. Weinrob co-chairman.

Libel In The Federal Courts

By JOSEPH L. NELLIS

Member Joseph L. Nellis is a member of Illinois and District of Columbia Bars. He is a former Associate Counsel to Investigate Crime in Interstate Commerce and former Special Counsel, New York State Crime Commission. He is practicing law in Washington, D. C.

I.

The law of libel has progressed steadily towards a better understanding of the type of injury it is designed to redress, i.e., an injury to the reputation, standing and character of the person libeled in a modern society in which reputation and the good will of the community are essential concomitants of success in business or the professions.

In recent years there has been noted a tremendous upswing in socalled "confidential" or "inside" disclosures in magazine form. Indeed, one of the periodicals in this field boasts that its circulation exceeds that of standard popular magazines by many hundreds of thousands of readers. It is superfluous to speculate on the reason for this unwholesome phenomenon in current American life, when one considers that yellow journalism reached its public peak in the 1920's when the old *New York Graphic,* the granddaddy of the "composite picture," ceased publication, after a lurid and sickening period of activity. Since that time, many newspapers have skirted the edges of minute examination into the private affairs of persons, but none have achieved the dubious station of the rash of trash now on the newsstands.

A natural consequence of the lowering of public taste in popular reading matter is the distinct increase in libel suits brought by aggrieved plaintiffs against this type of scandal purveyor. In recent weeks, Senator Margaret Chase Smith of Maine settled her suit against one of the "disclosure" books for $15,000 and a full retraction of the libel.

Perhaps the temporary successes of the scandal sheets has emboldened otherwise wary editors, for the increased number of suits brought has manifested itself in a new and relatively careless relation of ordinary newspapers, specialized newspapers (such as the labor press) and other publications to special groups within our society, such as members of the legal profession, writers and others. And as the character of popular reading material deteriorates so does the law of libel expand.

II.

In the federal courts libels are still justified by defendants on the grounds of truth, privilege or the doctrine of "fair comment" and criticism. The majority rule is clear: No claim of privilege or fair comment can prevail, if the alleged defamatory material falsely consists of charges of crime, corruption or gross misconduct, or where the alleged libel grossly exaggerates upon charges contained in an official record.[1] The general principle which the courts have been applying in recent years to defenses such as those mentioned are that criticisms of so much as another's activities as are matters of "public concern" are privileged if the criticisms, although defamatory, are upon a true or privileged statement of fact, or upon facts otherwise known or available to the recipient as a member of the public, represent the actual and unmalicious opinion of the critic and are not made solely for the purpose of causing harm.[2] Criticism of the *private* conduct or character of another who is engaged in activities of public concern, insofar as his private conduct or character affects his public conduct, is privileged, if the criticism, although defamatory, complies with the standards stated above for criticism of public conduct and, in addition, "is one which a man of reasonable intelligence and judgment might make."[3] Obviously, the test as to what a "reasonable" man might say in a "disclosure" magazine is so subjective as to be almost useless. Likewise, what an editor might say about a lawyer, actor or any other person whose vocation takes him before the public is hardly subject to this test of "reasonableness". Thus, in reading the alleged defamatory material the courts have tended to read the publication "in the sense to which readers to whom it is addressed would ordinarily understand it."[4] This involves the court in a study of the type of periodical in which the alleged libel appears. The general character of the "disclosure" magazines, the undeniable fact that the editors intend to reach the lowest emotional chord in a mass reading public would undoubtedly cause the court less difficulty, given an alleged defamation, than a libel published in an ordinary newspaper or a magazine of a different basic type than the scandal sheets. Of course, to all of this must be applied the standard defense of truth, or of privilege, fair comment and criticism.

More and more the courts are coming to recognize the inherent injury in character-assassination. To refer to one as a "communist" or "communist sympathizer" is, in the 1950's, libellous *per se,*[5] thus, shifting the burden of proof to the defendant that the statement was true or "substantially" true.[6] Implications of subversive associations[7] or disloyalty[8] are libellous *per se*, and again the burden of proof is placed on the defendant. In earlier days, allegations of "communist" support or belief were less

actionable than appellations such as "hyprocrite"[9] or "crook."[10] The courts have kept up with developing political situations and, in particular, take judicial notice of the fact that a man's business, family and reputation may be destroyed overnight, never to be regained, by a false charge of totalitarian connection.

Where the primary purpose of a periodical is circulation and "damn the consequences," and where such a periodical consistently deals with the sex, business, private and family life of public figures, the grim element of malice may become involved. Express malice may appear from the face of the publication or from extrinsic proof. The court will draw an inference of express libel, as a matter of law, if the periodical is excessive, unreasonable and intemperate, so as to exclude any reasonable conclusions other than that the editor was motivated by malice rather than fair comment or criticism.[1] It makes no difference whether the court finds that malice was *personally* intended or directed, or whether it finds that the malice consisted of impersonal intemperateness, designed for the gain of circulation rather than as a weapon against the aggrieved plaintiff. In either case, "the manner of the statement is material upon the question of malice and if the facts believed to be true are exaggerated, overdrawn or colored to the detriment of plaintiff, or not stated fully and fairly with respect to the plaintiff, the court or jury may properly consider these circumstances as evidence tending to prove actual malice and they may be sufficient for that purpose without other evidence on the subject."[12] Apart from the actual language used, all the circumstances surrounding the publication of the libel may be considered in inferring malice as a matter of law. For instance, a magazine which times its "expose" of a popular actor with the opening of a multi-million-dollar motion picture could not be heard to complain about the disclosure of this fact to a jury if an inference of malice is sought to be drawn. Other circumstances which may be considered by the jury, apart from the four corners of the language, are lack of proper investigation[13] by the periodical, statements which are insinuatory and disproportionate to the occasion[14] and statements that are based upon the wanton and careless disregard of the rights of plaintiff and others,[15] such as may occur in furthering the fortunes of a protege of the publication.

III.

In this necessarily brief statement of the situation confronted by the courts in the expansion of century-old libel doctrines, it is still impossible to state with certainty what an aggrieved plaintiff may expect as his reward for the time, trouble, publicity and expense it takes to bring suit. The "disclosure" magazines still publish every week of every year, and each year new ones appear on the scene. These magazines, if considered alone, would be sufficient to cause grave concern to the public welfare, but, what is more important, their influence and success has encouraged carelessness and even callousness among the more responsible members of the publishing fraternity. What else can account for the publication in book form of so many so-called "exposure" tomes and for their tremendous financial success? Why else would a reputable book publisher risk the publication of scandalous material of no literary value? Indeed, with the exception of certain independent newspapers and magazines of permanent standing in American households, there are hundreds of daily excursions into libel by persons from whom one would least expect it. Recently, his opinion regarding this problem. He responded, in substance, that the American reading public in recent years had come to regard "exposures," "disclosures" and "peeks" into the private lives of public figures as "necessary reading material." He said that if yielding to this mental curiousity "skirts the edge of libel we just have to risk it, for it is what our readers expect."

It is good to say that our courts are made of sterner stuff. In new cases brought recently, the federal courts have, almost uniformly, weighed the interest of the public against that of the individual in deciding whether the classic libel defenses (short of truth) overcame the injury done.[16] The protection of the public or of the aggrieved plaintiff is thus weighed against the public interest. In this type of determination the courts recognize that errors of fact, particularly in regard to a person's mental processes, are inevitable and if libel occurs as a result this is one of the costs of a free press and free public discussion. Moreover, whatever is added to the field of libel is taken from the field of free debate. But until recent years the courts have not had the new element injected by public disclosure of facts mixed with innuendo, insinuation of immorality and other such elements which make largely academic the issue of public discussion versus private rights.

The ultimate question to be decided, it seems evident, is whether "exposure" serves a legitimate public purpose in a given situation or whether it is done merely as a device for increasing circulation by yielding to the "peeping tom" instinct that seems prevalent in many of us. Even the proof that the alleged libellous material is "true" may no longer

serve as a complete defense if the courts decide the larger question against the proposition that a legitimate public purpose is served by exposure.

FOOTNOTES

[1]*Washington Times Co.* v. *Bonner*, 86 F.2d 836; *Lubore* v. *Pittsburgh Courier*, 101 F.Supp. 234; 110 ALR 393, and authorities cited.
[2]*Sweeney* v. *Patterson*, 128 F.2d 457, (cert. den. 317 U.S. 678); A.L.I. *Restatement of the Law of Torts*, Ch. 25 pp. 276-6; *Berg* v. *Printer's Ink*, 54 F. Supp. 795.
[3]A.L.I. *Restatement, supra; Potts* v. *Dies*, 132 F.2d 734.
[4]*Williams* v. *Anti-Defamation League of B'nai B'rith*, 185 F.2d 1005; *Sullivan* v. *Meyer*, 91 F.2d 301.
[5]*Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 95 L.Ed. 817; *Spanel* v. *Pegler*, 160 F.2d 619.
[6]*Fleckenstein* v. *Friedman*, 266 N.Y. 19; *Ashford* v. *Evening Star Newspaper Co.*, 41 App. D.C. 395; *Washington Times Co.* v. *Hines*, 5 F.2d 541.
[7]*Utah State Farm Bureau Federation* v. *National Farmers Union Service Corp.*, 198 F.2d 20, 33 ALR 2d 1186.
[8]*Parmalee* v. *Hearst Publ. Co.*, 341 Ill. App. 339; *Hartmann* v. *Winchell*, 63 N.Y.S. 2d 225.
[9]*Newby* v. *Times-Mirror Co.*, (Cal.) 160 p. 233.
[10]*Register Newspaper Co.* v. *Stone*, 31 Ky. L.Rep. 458; *Fisher* v. *Patterson*, 14 Ohio 418.
**Ashford* v. *Evening Star Newspaper Co., supra; National Disabled Soldiers' League* v. *Haan*, 4 F.2d 436.
[12]*Snively* v. *Record Publishing Co.*, 198 p. 1, cited in U.S. District Court, Judge Leon Yankwich's book entitled, *"It's Libel or Contempt If You Print It."* [1950.]
[13]*Cook* v. *Eastern Shore Newspapers*, 327 Ill. App. 559; 33 Am. Jur. pp. 247-251.
[14]*Peoples Life* v. *Talley*, 66 Va. 464. (This rule followed in *Russell* v. *Washington Post*, 31 App. D.C. 277.)
[15]*Hartmann* v. *Time, Inc.*, 64 F.Supp. 671.
[16]*Spanel* v. *Pegler, supra; Joint Anti-Fascist Refugee Committee* v. *McGrath, supra.*

ABRAM N. PRITZKER HONORED

Member Bernard Allen Fried was chairman, and members Nathan Schwartz and Congressman Sydney R. Yates co-chairman of a testimonial dinner on October 17 at the Sherman Hotel, honoring member Abram N. Pritzker "for his leadership and dedication to the Jewish Community and the State of Israel Bond Organization." Congressman Emanuel Celler of New York was guest speaker.

The affair was under the auspices of The Lawyers Division, Chicago Israel Bonds committee.

BENJAMIN MARCUS

Member Benjamin Marcus of Detroit, Michigan, was elected chairman of the Workmen's Compensation Section of the Michigan State Bar. Mr. Marcus is a co-founder and first national president of the National Association of Claimants Compensation Attorneys, a national organization for lawyers specializing in Workmen's Compensation, negligence and admiralty and railroad law.

Adopt Commercial Insurance Company Group Accident and Health Plan

Following the report of the Decalogue insurance committee, Herman B. Goldstein chairman, our Board of Managers approved the committee's recommendation that an accident and health insurance plan, underwritten by the Commercial Insurance Company of Newark, New Jersey, be accepted by our Society. This plan is administered by Parker, Aleshire and Company, who administer the same plan for the Chicago Bar Association and the Illinois State Bar Association.

In order to effectuate this plan, without evidence of insurability for those applying, a 40% enrollment of our members is required, with credit thereto to be given for our members who already are enrolled through the Chicago Bar Association or the Illinois State Bar Association.

Each member will soon receive a prospectus describing the plan, its benefits, and all other details pertaining to this form of accident and health insurance.

FINS' PUBLICATIONS IN NEW EDITIONS

The growing popularity in the legal profession of two well known contributions to legal lore by Harry G. Fins, member of our Board Managers necessitated, recently, new editions of his works. Their titles are: *Appeals and Writs of Error in Illinois* (Including Appeal to and Certiorari from the Supreme Court of the United States) and, *Federal Appelate Practice* (with emphasis on the Seventh Circuit). The former is in its third while the latter is in its eighth edition.

NORMAN BECKER, PRESIDENT

Member Norman Becker was elected president of Green Acres Country Club, Northbrook, Illinois.

FOR YOUR CALENDAR

The Decalogue Society 1957 Outing will be held on June 26 at Chevy Chase Country Club, Milwaukee Avenue, near Wheeling.

CONGRATULATIONS

Member Joseph Grant was elected a member of the Board of Governors of the College of Jewish Studies, Chicago.

Applications for Membership

FAVIL DAVID BERNS, *Chairman Membership Committee*

APPLICANTS	*SPONSORS*
Philip C. Goldstick	Sidney Sherman Favil D. Berns
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Sidney N. Fox	Richard S. Kaplan Morton Schaeffer
Norman Lettvin	F. D. Berns Morton Schaeffer

GREAT BOOKS

The fourth year of the Decalogue Society Great Books Discussion series begun on September 17 continues to attract members of our Society and their friends. At each meeting there is an analysis of a masterpiece that has stood the test of time and most critical evaluation.

The sessions convene on alternate Mondays, at 6:15 P.M., at the Decalogue offices, 180 West Washington Street. There is no fee for participation in the course. There are no educational or other prerequisites.

Messrs. Oscar M. Nudelman and Alec E. Weinrob are co-leaders of The Great Books course.

U. S. DEPARTMENT OF JUSTICE

The United States Department of Justice has arranged for distribution to all Hearing Officers in the United States and possessions reprints of member Zeamore A. Ader's article "Civil Rights of Conscience." The article appeared in Volume 6, number 2 (November-December, 1955) issue of The Decalogue Journal.

Honorable Herbert H. Lehman
41 East 57th Street
New York 22, New York

Dear Senator:

By unanimous vote of our Board of Managers we desire once again to join with all America in paying tribute to you upon the termination of your career as a United States Senator. Certainly few men in our generation have merited the grateful remembrance of all peoples to the extent that you have. We take pride in the fact that only last year we expressed this profound esteem by presenting you with our Award of Merit. We take such Awards very seriously. They are the result of continuous study and are bestowed without regard to politics, race, color or creed to that American whom we regard as having made the greatest contribution to the cause of democracy and the welfare of the American people. Certainly throughout your long career you have always been representative of the highest and best in American life. Once again we salute you and we hope you enjoy many years of good health and happiness. Remember us to your charming wife whom so many of us had the pleasure of meeting at the time of our dinner in your honor.

Warmest personal regards.

Sincerely yours,

Morton Schaeffer,
President
The Decalogue Society of Lawyers

CONGRATULATIONS!

The following members of our Society were elected to public office at the general election on November 6.

Judge Jacob M. Braude—Judge, Circuit Court

Nathan J. Kaplan—State Representative, 13 District

Abner J. Mikva—State Representative—23 District

Bernard I. Neistein—State Representative, 16 District

Judge David Lefkovits—reelected, Judge of The Municipal Court

Sidney R. Yates—reelected, Congressman, 9 Congressional District

Michael F. Zlatnik—State Representative, 8 District

Legal Research In Action

By BERNARD GREENSWEIG and JASON GESMER

Part of members Greensweig and Gesmer's practice is devoted to a Lawyers Research and Consulting Service.

Legal research may be defined for our purpose as the searching for legal authority. It is what the attorney often means when he says to his associate, "Find a case just like this one from Illinois." Whether we really anticipate being so fortunate as to find a case where the facts are "on all fours" or merely are searching for some legal authority, the process nevertheless is legal research. This article will deal with legal research as an integral part of an effective practice of law. Our approach will be to examine the process of legal research not only as an end in itself, but also as the implementation of the lawyer's analysis of factual problems which problems have been reduced to legal concepts through the use of established legal terminology.

All too often the task of implementation fails, not of its own accord, but because of a faulty reduction of the raw facts into a legal framework susceptible of competent investigation. And all too often when results are not forthcoming, is only human nature to place the blame on the inadequacies of the investigative process rather than on inarticulate analysis. This observation is aptly illustrated by the "story of a Vermont justice of the peace before whom a suit was brought by one farmer against another for breaking a churn. The justice took time to consider, and then said that he had looked through the statutes and could find nothing about churns, and gave judgment for the defendant."[1] Accordingly, it may be said that the investigative part of research can be no better than the analysis which precedes it. This does not mean that successful research requires that the attorney have at his fingertips all applicable principles of jurisprudence which he can, at will, place with the facts into a mixing bowl and with a bit of analytical tossing come up with a network of legal issues ready for smooth investigation. Nevertheless, a careful study and analysis of the facts and the formation of a provisional view of the principles applicable to the particular case is a most useful approach, even though such views are subject to reconsideration and modification as a result of subsequent research. By this method of procedure the attorney can save himself much labor by eliminating at an early stage a mass of material which is irrelevant to the real point.

To show that this problem of analysis is an extremely practical one, let us discuss a case drawn from our files. A group of real estate promoters transferred property in trust to a corporate trustee who served as titleholder for the convenience of numerous beneficial certificate holders. Managing trustees also were appointed to direct and authorize the actions of the corporate trustee. "A" in his capacity as managing trustee, induced "X" to purchase a note executed by the corporate trustee, which note was secured by a trust deed. Upon maturity of the note, repeated demands for payment were made by "X" upon the corporate trustee which demands were refused. "X" filed suit and named as parties defendant the corporate trustee and the board of managing trustees. The complaint alleged that the note was issued to "A" who, in turn, assigned it to "X". The answers contended *inter alia* that (1) "A" had no authority to transfer the note and trust deed to "X" and (2) "X" is not a holder in due course and therefore his rights are no greater than "A" 's rights. "X" 's attorney thereupon presented us with the following issue: *Since "X" has a negotiable note executed by the corporate trustee, why need we go behind the corporate trustee and be concerned with the authority of "A" to assign the note?*

Our first step was to study the pleadings and then to rephrase the issue in legal terminology, as follows: *If "X" is a holder in due course, any personal defense available against "A" (such as lack of authority) is not available against "X". Therefore, is "X" a holder in due course?* We then reviewed briefly the requisites of a holder in due course. Finding no elements lacking in "X" and deeming it wise to give provisional credence to the defendants' allegation, we proceeded to ascertain whether the note was negotiable. Upon examination of the note, we became doubtful of its negotiability. A preliminary search of the law on this point revealed a conflict which we concluded could not be resolved without extensive research. At the same time we observed that the note was a bearer instrument and was delivered to "X" without endorsement. This observation raised a further question as to whether "A" actually was a party to the note (as the complaint alleged) or merely an agent of the corporate trustee. While this observation was of no consequence if the note were held negotiable, we concluded that it could be used to advantage if the note were held to be non-negotiable.

We consulted with our attorney-client and agreed upon the following revised propositions:

(1) If the note is negotiable, "X" is a holder in due course and the question of "A" 's authority is no defense.

(2) If the note is non-negotiable, "X" must allege that "A" was not a party to the note but merely an agent and the sole issue becomes one of the authority of "A" to sell the note. The rights of "X" no longer are dependent upon the rights of "A" as his assignor.

As a result of this additional analysis, the attorney was able to conclude that the second proposition was so convincing that further research on the question of negotiability would be unnecessary. Accordingly, our only task was to provide a memorandum of law on the subject of the authority of "A" in the event that the question of negotiability was resolved unfavorably. While the attorney was amending his complaint to allege the agency theory, we were fortunate enough to locate one decision with a factual situation "on all fours" wherein it was held that the managing trustee was clothed with apparent authority to sell the note.

The importance of analysis may be illustrated in another way. It often is said that the law is not always logical. By this it is meant that the particular law does not coincide with one's predisposed view of what the law ought to be. Nevertheless, while a court decision may not be logical in the above sense, attorneys and judges nearly always adhere to formal logic in their articulation and application of legal principles, although few of us are consciously aware of it. This adherence to formal logic may be good or bad and may exhibit weakness or strength in our method of legal reasoning.[2] The important thing is that the use of formal logic prevails and a conscious knowledge of this fact should always be uppermost in the mind of the partisan researcher. For in this conscious knowledge often lies the motivation to summon all one's resources to arrive at a legal principal which may effectively supersede that of the opponent and thereby render unnecessary extended research on the opposing proposition.

To use an oversimplified illustration,[3] let us assume that the school board of a particular city has insisted that all teachers, as a condition of procuring employment, sign a contract by which they would agree not to join a teachers' union. A group of teachers propose to bring suit to compel the school board to hire teachers without imposing this condition. The defense of the school board is clear. It would argue as a legal principle that one who is under no duty to enter into a contract with another may demand any provision he pleases as a condition to entering into a contract. This constitutes the board's major premise. The board would then advance, as a minor premise, that it is under no duty to enter into a contract with any particular teacher. A court could then reason syllogistically—that is, it would apply its major premise to its minor premise—and reach inescapably a conclusion favorable to the school board. The above legal principle, the major premise, is well known and is supported by authority. The syllogistic reasoning is flawless. By analysis, the plaintiff's attorney has successfully anticipated the defense. Is his next move to search for an exception to the legal principle employed, and if none is to be found, to abandon the case? Not at all. To begin research at this point is to proceed blindly because the attorney will have neglected an essential part of his analysis. The defense is based on a strong major premise. To research that premise at this point is to assume that it is the only valid major premise applicable to the case. Why not further employ his "instinct" for legal principle and select a major premise which, when syllogistically concluded, will affirmatively support the proposed suit? Consider the following major premise: Officials administering the trust of public office may not unreasonably discriminate among applicants for employment. This legal principle also is supported by authority. With the major premise in mind, the facts may be argued in terms of the following minor premise: To deny employment to a teacher because he refuses to agree not to join an organization of teachers is an unreasonable discrimination. This syllogistic reasoning would result inevitably in a conclusion favorable to plaintiffs.

It becomes clear that the basis of any decision will be the particular major premise relied upon by the court. In most cases, the task of the court is to select the major premise and to determine whether the facts support one minor premise or another. An awareness of this formalistic approach to legal reasoning can be an invaluable labor-saving and time-saving asset to the attorney in the analysis and research of a legal problem.

Let us consider now the typical research assignment wherein the analysis of the facts has led to issues phrased in proper legal terminology, susceptible to investigation. Our research technique is tailored to our practice, which requires speed in addition to careful and thorough work. Our first step is a brief analysis of the problem to determine if the issue is substantive or procedural in nature. An immediate search is then made for any statutory material in the proper jurisdiction. If there is a statute applicable, our attention is first concentrated upon discovering its relationship to our problem. This is followed by a perusal of the annotated cases and, if necessary, committee reports.

If there is no statutory material, the initial investigation of a substantive law problem should be made with the aid of an encyclopedia, such as Corpus Juris Secundum or American Jurisprudence. The chief reason for its use is to make certain that the researcher does not neglect related issues, although it may be used also to refresh his knowledge of the general area of law involved. We do not recommend the immediate use of treatises or Law Review articles for they usually are too complex and theoretical for rapid results. For that same reason we do recommend treatise and Law Review inquiry if the encyclodpedias present conflicts or are unproductive for the particular problem. By way of illustration, we again draw from an actual case in our files. We were given facts from which to proceed and the attorney advised that "estoppel by verdict" was the controlling doctrine. Because the encyclopedias presented a conflict of terminology and meanings, we turned to treatises. Only in *Black on Judgments* were we able to find a clear discussion of and distinction between estoppel by verdict, estoppel by judgment, res judicata, estoppel by record and collateral estoppel.

Usually, we commence our research with American Jurisprudence rather than Corpus Juris Secundum solely because the former may lead to the American Law Reports, an excellent shortcut to cases. This does not constitute an endorsement of American Jurisprudence for often there is no annotation on the issue in point in the American Law Report volumes.

Even if we are directed to cases in the particular jurisdiction by the encyclopedias, we always proceed next to the Digest System. Furthermore, when the issue to be researched is quite clear and all that is needed is authority, the encyclopedias may be bypassed in favor of the Digest for the particular jurisdiction. Consider a request by an attorney to determine if the failure by a judge to rule on a motion to suppress evidence is ground for appeal. We were able to move at once to the subject of *Appeal and Error* in the Digest System wherein a number of cases were listed under the heading, "Failure to rule on motion or objection." Needless to say, the researcher should modify any procedure discussed herein if he has specialized knowledge of the particular problem.

The last operation of most researchers prior to the preparation of the memorandum is to "shepardize" the leading or controlling cases. This must be done. However, we recommend a further step which may be of value. Scan the advance sheets of the jurisdiction for any recent reference to the problem which might have been overlooked. The time invested often will be rewarded.

Procedural problems should be treated in the same manner as substantive problems, with several exceptions. If a Civil Practice Act has been adopted in the jurisdiction, this offers the best entry to the law, particularly if there are annotated cases included. The Supreme Court Rules of a state often are annotated and are of considerable value. With respect to procedure in the Federal Courts, there are several good sources including the *United States Code Annotated, Moore's Federal Practice* and *Federal Rules Service.*

In the preparation of the legal memorandum, the professional researcher should make economic use of his authorities. Legal principles supported in each instance by one or two cases should dominate the memorandum. Moreover, our experience is that a judge who declines to accept a proposition unless supported by authority is more easily won by an argument which appears to convince by its own inherent strength and which does not require at every point to be propped up by profuse reference to authority.

We have emphasized the importance of analysis and we have outlined our technique of legal research. But beyond analysis and a pattern of approach and a knowledge of law library materials, such factors as familiarity with broad legal principles, a vivid sense of analogy, a quick mind, a penetrating insight and a lively imagination make all the difference in the world as regards the end result.[4]

[1]HOLMES, *The Path of the Law* in COLLECTED LEGAL PAPERS 167, 196 (1920).

[2]Frank, *Law and the Modern Mind.*

[3]See note 2.

[4]Gardner, *A Note on Legal Research*, 46 Law Library Journal 21 (1953).

1957 Decalogue Appointment Book Available Shortly

Oscar M. Nudelman, chairman of our Diary and Directory book, announces that the 1957 volume, long an indispensable aid in servicing a lawyer's office, will be available this year, for free distribution to members of our Society, between the 10th and 15th of December. The book may be obtained in our headquarters at 180 West Washington Street between 10 A.M. and 5 P.M.

. . . The Decalogue Journal has been an eloquent and articulate medium in alerting the profession to inroads upon the rights of the individual . . .

—Thomas C. Clark, Associate Justice of the United States Supreme Court

The Board of Managers of our Society directed that the following letter be sent to the widow of Mr. Marshall Field, the recipient of our Society's Annual Award of Merit for 1942.

Mrs. Marshall Field
c/o Chicago Sun-Times
211 West Wacker Drive
Chicago, Illinois

Dear Mrs. Field:

The Decalogue Society of Lawyers joins with the entire community in paying its respects to your late husband. We expressed our high opinion of him during his lifetime when we bestowed upon him our Award of Merit. He was, in fact, one of the first persons to receive this Award which has since then been bestowed upon Wendell L. Willkie, Rabbi Stephen S. Wise, Bishop Bernard J. Shiel, Governor Adlai E. Stevenson, President Harry S. Truman, Professor Albert Einstein and others.

This community has suffered a grievous loss in his death. He will long be remembered for his compassionate interest in every great cause. Please extend to the family our deepest sympathy.

Sincerely yours,

Morton Schaeffer,
President
The Decalogue Society of Lawyers

What's Your Preference?

President Morton Schaeffer has issued an appeal asking for member participation in Society's activities by joining a committee of member's preference. Mr. Schaeffer urges members to indicate their choices on a postcard recently addressed to them and return the card to Society's offices at 180 W. Washington Street.

"The Decalogue Society of Lawyers," stated Mr. Schaeffer, "is now in its 23rd year. Each year has seen a gratifying increase in its activities. The program of our Society has become a recognized boon to the legal profession."

The following are some of the committees members are requested to join: Civic Affairs; Forum; House and Library; Insurance; Legal Education; Legislation; Public Relations; Membership; Membership retention and conservation; Placement and Employment; Younger Members.

SOCIETY HOST TO JUDICIARY

A *Toast to the Bench*, a most popular feature of our Society's social activities will be held on December 19 at 4:00 P.M. in the Grand Ballroom of the Covenant Club. Initiated but three years ago to emphasize our association's esteem for all the courts in the Chicago area, the event has drawn ever larger attendance of members and their friends. The judges of the Federal, State and City courts will be honored guests of our Society. Admission to the affair is $2.50 per person.

First vice-president Solomon Jesmer, in charge of the arrangements, urges all members to make early reservations.

JUDGE JAY A. SCHILLER

In the passing of Judge Jay A. Schiller, on October 25, 1956, our Society has lost a charter member and one who was actively and devotedly interested in the welfare of our Bar association. He was much liked by all who knew him. Approachable and democratic in his relations with fellow lawyers, his wit and the charm of his character earned for him, throughout his more than two decades of membership in The Decalogue Society, hundreds of friends and admirers.

Born in Elgin in 1894, he was educated in Chicago elementary and high schools and was graduated from De Paul University in 1921. He was an Army lieutenant in World War I. He served for five years as secretary to the late Congressman A. J. Sabath. Later as assistant Corporation Counsel under mayors William Dever, and William Hale Thompson.

The Judge, a Democrat in politics, was first elected to the Municipal Court in 1930 and was re-elected for four consecutive six year terms on the Democratic ticket. Dean of Chicago Municipal Court judges, he served on the bench continuously for twenty-six years. During World War II he served as a Coast Guard.

Judge Schiller gave much of himself to communal and civic causes in this city, both Jewish and Christian. He was a past president of Ramah Lodge, B'nai B'rith, and he served for many years on several philanthropic, religious and social service organizations. The Judge was active in The American Legion.

Survivors include the widow Florence, and three sons, Donald, Stanley, and Jay A. Jr., a member of our Society.

Lawyer's LIBRARY

Learning is an ornament in prosperity, a refuge in adversity, and a provision in old age. —ARISTOTLE

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Ashley, P. P. *Say It Safely: Legal Limits in Journalism and Broadcasting.* Seattle, University of Washington Press, 1956. 116 p. $2.25.

Benton, Wilbourn E. *Nuremberg: German Views on the War Trials.* Dallas Southern Methodist Univ. Press, 1955. 232 p.

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Brown, Robert E. *Charles Beard and the Constitution.* Princeton, Princeton Univ. Press, 1956. 219 p.

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Frankfurter, Felix. *Of Law and Men; Papers and Addresses of Felix Frankfurter, 1939-1956.* New York, Harcourt, Brace. 1956. 364 p.

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Glueck, Sheldon & Eleanor. *Physique and Delinquency.* N. Y., Harper, 1956, 339 p. $6.00.

Grisby, E. D. *Illinois Real Property. 1956 Pocket Parts.* Chicago, Burdette Smith, 1956.

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Illinois Legislative Council. *State Regulation of Psychologists. Research Report.* Springfield, Ill., The Council, 1956. 22 p. Apply. (Bulletin 2-580)

Koestler, Arthur. *Reflections on Hanging.* London, Gollancz, 1956. 193 p. 12s.6d.

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Pollack, E. H. *Fundamentals of Legal Research.* Brooklyn, Foundation Press, 1956. 295 p. $5.00.

Ransom, H. H. *The First Copyright Statute: An Essay On An Act For the Encouragement of Learning, 1710.* Austin, Univ. of Texas Press, 1956. 145 p. $3.75.

Rothenberg, Stanley. *Copyright Law; Basic and Related Materials.* N. Y., Clark Boardman, 1956. 1100 p. $20.00.

Stanton, Bailey. *Illinois Attachment and Garnishment Laws.* Indianapolis, Bobbs-Merrill, 1956. 289 p. $12.50.

Stanton, Bailey. *Illinois Real Property Law.* Indianapolis, Bobbs-Merrill, 1956. 872 p. $22.50.

MERIT AWARD DINNER ON MARCH 9

The Decalogue Society annual Merit Award Dinner will be held in The Palmer House on Saturday, March 9, 1957. The name of the recipient of the award will be announced shortly.

JOHN DOE . . .

By JAN STRUTHER

John Doe, he heard a speech.
It didn't plead, it didn't preach.
It wasn't loud, it wasn't wild,
It didn't treat him like a child.
It even carried one or two
Words he hadn't known he knew.
John Doe scratched his head:
John Doe smiled, and said:
"Richard wouldn't understand—
But as for me, I think it's grand."

Richard Roe, he heard it too;
Listened hard the whole way through.
It made him feel he wasn't dense—
Addressed him like a man of sense.
It made him feel, "I'm not a fool—
I still remember stuff from school."
Richard Roe, he rubbed his eyes
With a kind of proud surprise.
" 'Tisn't quite in Johnny's line—
But as for me, I liked it fine."

Doe and Roe met face to face
Just outside the polling-place.
"Well, what's new?" said Doe to Roe,
"Nothing much," said Roe to Doe.
"Whaddya know?" said Roe to Doe.
"Not a thing," said Doe to Roe.
In they went, and out they came,
Looking just about the same.
He, and he alone (thought each)
Had *really* understood that speech.

From: *Major Campaign Speeches,* by Adlai E. Stevenson.

Company-Union Rights and the Fifth Amendment

By HARRY ABRAHAMS

Member Harry Abrahams is Labor arbitrator, associate professor of Law De Paul University, and chairman of the Law and Legislation committee of the National Academy of Arbitrators.

DIGEST OF THE ARBITRATION AWARD

In the Matter of the Arbitration between Westinghouse Air Brake Company and United Electrical, Radio and Machine Workers of America, Local 610. In Re: Discharge of Harold Briney and Theodore Wright.

The substance of this article deals with the discharge of two employees working in a defense plant after their refusal to testify before a Senate investigating committee upon pleading the Fifth Amendment. The employees refused to answer questions as to whether they were members of the Communist party at any time prior to the time of their testimony. The matter was heard in Wilmerding, Pa. The Board of arbitrators consisted of Joseph Dermody of New York, appointed by the Union, James A. Carlson of Pittsburgh, appointed by the Company, and member Harry Abrahams, appointed by the Federal Mediation and Conciliation Service.

The award was entered on September 26, 1956 and appears in full in 27 Labor Arbitration Reports, page 265.

Submission Agreement

"Westinghouse Air Brake Company and United Electrical, Radio and Machine Workers of America (UE) Local 610, having been unable satisfactorily to adjust certain grievances, it is agreed that the same be submitted to arbitration.

"It is further agreed that Harry Abrahams of Chicago, Illinois, having been selected by the Federal Mediation and Conciliation Service from a list of names submitted by the parties, shall act as the third impartial member and chairman of the arbitration board, the other two members being James A. Carlson, designated by the employer, and Joseph Dermody, designated by the Union.

"The award of the majority of the Board of Arbitration shall be final and binding on all the parties.

"The issues presented are whether or not Harold Briney and Theodore Wright were suspended and then discharged by the Company for proper cause, and what the rights, if any, of said employees are under the Agreement in respect to reinstatement and back pay."

Contract Provisions Involved

Article I, Section 2

"The Company and the Union agree that there shall be no discrimination against any employee on account of race, creed, national origin, or political belief."

Article I, Section 7

"Management of the plant and direction of the working forces are vested in the Company. The exercise of such rights by the Company shall include but not be limited to the right to hire, assign and schedule the work, promote, demote, transfer, make temporary layoffs, drop for lack of business and to suspend or discharge or otherwise discipline employees for proper cause provided that no action so taken shall be in violation of any other provision of this Agreement."

Background of the Dispute

The Company at the time of the hearing had on its books, $65,000,000.00 of Government orders and was seeking additional orders from the Government running over 100 Million Dollars. 22% of the Company total business was devoted to the manufacture of products for the United States Government. The bulk of the Government order was classified for security purposes as 80% of the Company's defense work was for the Air Force.

During the first week in January, 1955, the Company had $55,000,000.00 worth of classified Government Contract Work and outstanding proposals for an additional $18,000,000.00 of Classified work.

The Company employed a total of 14,500 persons in its operating subdivisions and subsidiary corporations, which as a closely integrated family group coordinate their efforts to supply important material to the Armed Services and other Government Agencies.

The Union is the Collective Bargaining Agent for approximately 5,000 of the Company's production and maintenance employees at three of its operating divisions, the Air Brake and Industrial Products Divisions at Wilmerding, Pennsylvania, and the Union Switch and Signal Division at Swissvale, Pennsylvania.

This Arbitration deals with the discharge of employees of the Company, Harold Briney and Theodore Wright. They were discharged on April 11, 1955. Prior to their discharge on January 10, 1955, they were suspended by the Company for a period of 90 days with pay on the condition to be hereinafter set forth.

At the hearing it was stipulated between the parties: that Harold Briney, 59 years of age, was first employed by the Company in December, 1915; that he worked for the Company a total period of somewhat more than 35 years, and has continuous service with the Company for more than 29 years from March 17, 1926. That he served in the U.S. Navy from December, 1917 to March 1919; that his last job with the Company was a Cold Roll Machine Operator and Welder, at an average hourly straight time rate of $2.82; that during the said 90 days suspension period, he was paid by the Company at that rate for 40 hours each week; that Theodore Wright, 50 years of age, was first employed by the Company in 1924; that he worked for the Company a total period of about 30 years and has had continuous service with the Company for almost 29 years from 1926; that his last job with the Company was on a Herman machine (Molding) at an average hourly straight time rate of $2.55; that during the said 90 day suspension period, he was paid by the Company at that rate for 40 hours each week; that both Briney and Wright appeared and testified pursuant to a subpoena on January 3, 1955 before the U. S. Senate Special Committee on Investigations of the Committee on Government Operations dealing with the investigation of subversion in defense installations; that both Briney and Wright were suspended by the Company on January 10, 1955 and discharged on April 11, 1955; that on January 10, 1955 and on April 11, 1955, the Company sent notices to all of its employees notifying them of the suspension and discharge of Harold Briney and

Theodore Wright; that Briney and Wright were never employed by the Company in classified work, nor did the Company or any Government Agency require or request security clearance for them; that in 1950, Wright signed a questionnaire issued by the Company wherein he denied that he was a member of the Communist Party; that in 1950, Briney signed a card distributed to all employees wherein he denied that he was a member of the Communist Party; that Briney has signed non-communistic affidavits as required by the Labor Management Relations Act of 1947 once every year since the period 1949 through 1954, the last such affidavit having been signed by him on or about October, 1954; that Local 610 of the Union involved in this matter which Briney has been and is the President, has been declared by the National Labor Relations Board to be in full compliance with the provisions of Section 9 (f) (g) and (h) of the Labor Management Relations Act since on or about November, 1949; that Briney has been President of Local 610 since 1947; he was last elected in October, 1954; that said Union was certified to by the National Labor Relations Board in 1937 as the Collective Bargaining Representative of the employees of a unit of the Company's Air Brake Division; that Wright was elected to and served as Vice President of a C.I.O. Organizing Committee for Railrod Transportation Equipment Works in 1937, and in the same year was elected as President of that Committee; that since 1937 he has held many offices within the Union; that since the certification of the Union, there has been no more than 10 arbitrations of unsettled grievances, and that on all levels of the grievance procedure considerably more than 1,000 grievances have been processed annually; that Briney appeared and testified pursuant to a subpoena on November 10, 1953 before a Sub-Committee of a Sub-Committee on internal security of the Senate Judiciary Committee at which time he invoked the Fifth Amendment; that at the hearing on November 9, 1953 before the said Senate Sub-Committee, one Francis Nestler testified under oath that he did not know Briney as a Communist.

* * *

That at the hearing on January 3, 1955 before the Sub-Committee of a Senate Permanent Sub-Committee on Investigation, Francis Nestler further testified under oath that he knew Briney as a Communist.

It was further stipulated and agreed between the Company and the Union that the suspension and discharge by the Company of Briney and Wright was not related to their work record; that the Company did not at any time or at or before the suspension and discharge of Briney and Wright have any evidence of any acts of sabotage or espionage by Briney or Wright, and that during their tenure of Union Office and while employed by the Company, Briney and Wright have conducted themselves as responsible Union representatives in their dealings with the Company.

From the evidence at the Arbitration Hearing, Briney and Wright testified before the Senate Special Committee on Investigation of the Committee on Government Operations on January 3, 1955. There they testified at 1:30 P.M. on January 3, 1955 that they were not Communists. With reference to other interrogation as to whether they were members of the Communist Party before that time, or as to whether they attended Communist meetings, or as to whether they knew certain communists, they refused to testify on the basis than any statement that they might make may tend to incriminate them, and for that reason they were pleading the Fifth Amendment of the Constitution.

Also, at the hearing on January 3, 1955 before the said Senate Investigating Committee, Witness Mary Stella Beynon identified Wright as a member of the Communist Party.

Another witness at the hearing, Peter Tom Lydon, also identified Wright as a member of the Communist Party, but he did not identify Briney as a member of the Communist Party.

Harold G. Stuart, a Washington, D. C. attorney, reported to Company officials the attitude of the Air Force and the members of the Subcommittee, and recommended that the Company had no alternative but to discharge Briney and Wright if it expected to continue with defense or Government contracts.

At a meeting between the Company and the Union on January 5, 1955, it was the Company's suggestion that Briney and Wright take leaves of absence and clear themselves before the Subcommittee, but this suggestion was rejected by the Union.

On January 10, 1955, Briney and Wright were suspended by the Company with pay for a period not to exceed 90 days. Each was notified that he would be reinstated if he would clear his record to the satisfaction of the Subcommittee either by appearing before or by obtaining and furnishing to that Committee a written certification or statement of an accredited security agency of the United States to the effect that such agency, upon investigation, had found no evidence which in its opinion would indicate that the employee is a Communist or otherwise a substantial risk for employment in an industrial establishment such as Westinghouse Air Brake Company. Each notice also stated that if such clearance was not accomplished by the end of the 90-day suspension period, he would be discharged. The Company notified the Subcommittee of its action.

The 90-day suspension period expired on April 10, 1955, and the next day the Company advised each of the two employees by telegram that since it had received no notification from the Committee as to his compliance with the conditions in the suspension notice of January 10, 1955, he was discharged from the employ of the Company, effective immediately.

On April 18, 1955, the Union due to the discharges of Briney and Wright on April 11, 1955 signed grievances on the ground that Section 2 and Section 7 of Article I of the Collective Bargaining Agreement had been violated. The Company rejected these grievances, thereby bringing these matters to Arbitration.

Discussion

Harold K. Briney and Theodore Wright, employees of the Company, when called to testify before the United States Senate Investigating Subcommittee on January 3, 1955, invoked the Fifth Amendment of the Constitution in declining to testify as to past membership in the Communist Party and as to any past Communist activities or associations prior to 1:30 P.M. on January 3, 1955. They did testify at that time before this Senate Subcommittee that they were not Communists.

* * *

After Briney and Wright had invoked the Fifth Amendment in refusing to answer any questions pertaining to their Communist Membership activities or associations prior to 1:30 P.M. on January 3, 1955, the Charman of the Subcommittee directed that a transcript of the proceedings be sent to the Company and that the Company be requested to report back to the Subcommittee as to the action the Company was to take with respect to Briney and Wright.

The policy of the said Senate Sub-Committee was expressed by Senator Earl E. Mundt on December 7, 1954, when he said, "anybody working in a defense plant who

has been charged with being a Communist, and who takes refuge under the Fifth Amendment . . . is not a suitable employee to work in a defense plant" and "in the interest of the national defense, should be summarily removed." Furthermore, stated Senator Mundt at the time, "It is going to be our recommendation to the Secretary of Defense that we withdraw or cancel any defense contracts that we have with corporations that insist on employing Communists or subversives, or those who refuse to deny or affirm their connection with subversive organizations."

The said hearing of January 3, 1955, and the refusal of Briney and Wright to testify as above stated received nationwide publicity by radio, television and in newspapers published all over the Country. Westinghouse Air Brake Company was identified as their employer.

The Air Force immediately after the January 3, 1955 episode issued an order holding up an Award of a contract to the Company, pending action of the Company with regard to Briney and Wright and pending the security clearance of the Company.

After many conferences between the Company officials, it was decided by the Company that Briney and Wright would be suspended for a 90-day period with pay with the understanding that if Briney and Wright appeared before the Committee or before an accredited Security Agency, and if the Committee or the Security Agency would be satisfied with the security clearances of Briney and Wright, that they would be put back on their jobs; otherwise, at the end of the 90-day period, they would be discharged.

The 90-day suspension period expired on April 10, 1955, and since neither Briney nor Wright had appeared before or had been cleared by the Committee or an accredited Security Agency of the Government, the Company on April 11, 1955, advised both Briney and Wright by telegram that since it had received no notification of their security clearance, they were discharged from the employ of the Company effective imediately.

The major question presented to this Board of Arbitrators is whether or not Briney and Wrigth were suspended and then discharged by the Company for proper cause. In other words, did the Company have proper cause under the Contract under all the circumstances involved to discharge both Briney and Wright as they did.

The Union's first contention, on the ground that the Company did not have proper cause to discharge both Briney and Wright, was based on the fact that they had a right under the Constitution to invoke the Fifth Amendment before the Committee. There is no question that Briney and Wright, while testifying before the Senate Investigating Committee, had the constitutional right under the circumstances to invoke the Fifth Amendment while so testifying. This is agreed to by the entire Board of Arbitrators.

The effect upon the Company by the failure of Briney and Wright to try to obtain a security clearance from an accredited security agency or the Committee is a matter to be now considered.

Briney and Wright were employed by the Company at its Air Brake Division in Wilmerding, Pennsylvania, Briney as a Cold Roll Machine Operator and Welder; and Wright as a Molding Machine Operator. The work done by Briney and Wright was not on classified projects. The Air Brake Division not only produced defense material under Government contracts, but also a wide variety of air brakes and air brake accessory equipment for use in all kinds of railroad operations in the United States. The Company was involved in defense work and had to be subject to security clearance. The work was important to the defense effort as it dealt with transportation, Radar, Flight Simulators, Research and Development, and maintenance of highly specialized equipment.

* * *

The Company knew of the viewpoint of the said Senate Investigating Committee and accordingly was apprehensive of what may happen to the war work that it had amounting to many millions of dollars, and the application that it had for additional work from the Government amounting to many more millions of dollars. The Company further knew that if its security clearance would have been revoked, not only it, but its employees working on classified material, would be seriously affected.

National and international publicity was given to the testimony of both Briney and Wright, and the Company was linked along with their names. The effect that such publicity might have upon its customers, employees, shareholders and directors was also a matter of concern to the Company.

The next proposition presented by the Union was that the suspension and discharge of Briney and Wright constituted discrimination against them because of their political beliefs in violation of Article I, Section 2 of the Contract. The political beliefs stressed by the Union were the opposition of Briney and Wright to McCarthyism based upon their political beliefs. Just what those political beliefs were, were not definitely set out. If the said political belief referred to Communism, then the Communist Control Act of 1954 would dispose of the matter.

The Communist Control Act of 1954 set out in 50 USCA 841 et seq. states that the Congress found the Communist Party of the United States was not a political party but instead an "instrumentality of a conspiracy to overthrow the Government of the United States," and the Act consequently outlawed the Communist Party.

Section 2 of that Act reads as follows:

"The Congress finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. It constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution. Unlike political parties, which evolve their policies and programs through public means, by the reconciliation of a wide variety of individual views, and submit those policies and programs to the electorate at large for approval or disapproval, the policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement. Its members have no part in determining its goals, and are not permitted to voice dissent to party objectives. Unlike members of political parties, members of the Communist Party are recruited for indoctrination with respect to its objectives and methods, and are organized instructed, and disciplined to carry into action slavishly the assignments given them by their hierarchical chieftians. Unlike political parties, the Communist Party acknowledges no constitutional or statutory limitations upon its conduct or upon that of its members. The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present constitutional Government of the United States

ultimately must be brought to ruin by any available means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear present and continuing danger to the security of the United States. It is the means whereby individuals are seduced into the service of the world Communist movement, trained to do its bidding, and directed and controlled in the conspiratorial performance of their revolutionary services. Therefore, the Communist Party should be outlawed."

Section 4 of that Act also extended the penalties provided by the Internal Security Act of 1950 USCA 781-826, and reads as follows:

"Whoever knowingly and willfully becomes or remains a member of (1) the Communist Party, or (2) any other organization having for one of its purposes or objectives the establishment, control conduct, seizure, or overthrow of the Government of the United States, or the government of any State or political sub-division thereof, by the use of force or violence, with knowledge of the purpose or objective of such organization shall be subject to all the provisions and penalties of the Internal Security Act of 1950, as amended, as a member of a 'Communist-action' organization.

"(b) For the purposes of this section, the term 'Communist Party' means the organization now known as the Communist Party of the United States of America, the Communist Party of any State or subdivision thereof, and any unit or subdivision of any such organization, whether or not any change is hereafter made in the name thereof."

At the Senate Committee Hearing on January 3, 1955, Briney and Wright were first pointed out by a witness, under oath, as having been members of the Communist Party. Wright was identified by two witnesses—one, Mary Stella Beynon; and the other Peter Tom Lydon. Briney was identified by one witness, Frank Nestler, who had in 1953 been unable to identify Briney as a member of the Communist Party.

At a meeting between the officials of the Company and the Union representatives on January 5, 1955, the officials of the Company testified that Briney at that time admitted that he had joined the Communist Party in 1943; that he had remained a dues-paying member until 1947 when he stopped paying dues and attempted to resign; that he was told by a Communist official that he could not do so; that Briney stated that if he had testified as to his Communist activities before the Subcommittee, he would have lost his position as a respected leader because he would have been placed in the position of a stoolpigeon, compelled to testify in public as to the identity of others whom he knew to be party members, what meetings he attended, and what activities he had participated in, all of which would have led him to incriminate others and accuse them of being members of the Communist Party.

The only testimony to the contrary introduced by the Union at the Arbitration Hearing was that none of the Union members that attended that meeting between the Company and the Union heard Briney make any such statements. Briney, who was also at the Arbitration Hearing, did not testify. Therefore, on the basis of the evidence that has been presented before the Board of Arbitrators, the positive statements made by the Company witnesses as to their conversation with Briney, must be accepted as against the negative testimony of the Union members present that they did not hear such statements.

There is no question that both Briney and Wright under the Constitution of the United States, had the right to plead the Fifth Amendment at the hearings held by the Senate Investigating Committee; but in view of the fact that there was uncontradicted evidence that Briney and Wright had been members of the Communist Party, the Company had no alternative but to accept that as a fact until evidence to the contrary had been produced. No such evidence was forthcoming.

The Westinghouse Air Brake Company operated plants in California, Pennsylvania, Wisconsin, Ohio, Michigan, Illinois, Indiana, Georgia, Virginia, Massachusetts, Oklahoma and Texas.

Under the Organizational Chart received into evidence, the Air Brake Division of the Company and the Industrial Products Division both were operated in Wilmerding, Pennsylvania. The Industrial Products Division located in Wilmerding, Pennsylvania, also operates in part of the Wilmerding Plant's area in the Air Brake Division. Its products include the following as major items: Air Compressors; Air Cylinders and Actuators; Air Control Devices; Pneumatic Control Systems for Landing Craft; Minesweepers, PT-Boats, Yard Tugs, and Destroyer Escorts; Pneumatic Control for Variable-Pitch Ship Propellers; Aircraft Anti-Skid Devices, and Aircraft Pneumatic Controls and other important equipment.

Some of the products produced at the Air Brake Division would be moved to the Union Switch and Signal Division for additional use. The work done on a defense contract would be integrated between the Air Brake Division, Industrial Products Division, and the Union Switch and Signal Division.

The Company was engaged in defense work amounting to 55 million dollars and was seeking a contract from the Government involving 18 million dollars of additional defense work. This latter contract was held up until the Company discharged Briney and Wright.

* * *

When an employer discharges an employee, the burden generally rests upon the employer to show proper cause for such discharge. At the present time, under the Communist Control Act of 1954 (50 USCA 841, etc.), and the Internal Security Act (50 USCA 781, etc.), when an employee working in an industrial plant that is doing defense work, is initially shown by adequate and competent evidence to have been at one time a member of the Communist Party, the burden shifts to that employee to prove that: he no longer is a member of the Communist Party; the date he left the party; and that he does not now advocate any of its principles. This was not done, or attempted to be done, by Briney or Wright. The discharge of Briney and Wright was not arbitrary or capricious, but under all the circumstanres was for proper cause.

The Board of Arbitrators met in Chicago, Illinois, on March 13 and 14, 1956, and on September 24 and 26, 1956, to consider this Award.

AWARD

It is the Award of this Board of Arbitrators that Harold Briney and Theodore Wright were suspended and then discharged by the Company, as herein set out, for proper cause.

HARRY ABRAHAMS
Impartial Arbitrator

JAMES A. CARLSON
Company Appointed Arbitrator

JOSEPH DERMODY, dissents
Union Appointed Arbitrator

BOOK REVIEWS

KNOW YOUR SOCIAL SECURITY, by Arthur Larson. Harper & Brothers. 202 pp. $2.95.

Reviewed by JACK EDWARD DWORK

Jack E. Dwork is a past president of the Decalogue Society and the author of "Social Security in a Nutshell."

As developed to date by the many progressive amendments, culminating with those of 1956, Social Security is now more than ever before a vital factor in the insurance and retirement program of every American family. As of January 1, 1956, fifty-four million workers and self-employed persons are covered by Social Security. The self-employed doctor is the only remaining professional person not included under its coverage. The benefits of Social Security have been so increased and its eligibility provisions so liberalized, as to make it essential that every person know and understand the all-important protection it affords to him and his dependents against wage loss due to death, disability or unemployment. This book, written by Arthur Larson, former Dean of the University of Pittsburgh Law School, provides for the layman an unusually clear and comprehensive explanation of the rather intricate system of Social Security. He traces the historical background of Social Security from the first conception of the subject by Otto von Bismarck in 1870 to our current system.

The division of the book into sections entitled "what you should know as a citizen", "as an employee", "as a beneficiary", "as an employer", and as a "self-employer", is a novel method of enabling the reader to concentrate upon his own particular status without devoting time to extraneous matter; also it serves as an expedient method for reference. The section applicable to the reader fully and clearly defines to him his duties, rights, and benefits under Social Security.

The 1956 Amendments to the Act, recently enacted, unfortunately, render this and all other books on the subject incomplete and inadequate. It is hoped that Mr. Larson's duties as Under Secretary of State will not prevent him from revising *KNOW YOUR SOCIAL SECURITY* and incorporating therein the new amendments in the same clear and informative manner that distinguish his useful volume.

SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION, a series of lectures by Professor Edmund M. Morgan delivered before the faculty and students of Columbia Law School and members of the New York Bar. Columbia University Press. 195 pp. $3.50.

Reviewed by LEONARD J. BRAVER

Professor Morgan's lectures offer a thought provoking presentation of our procedural rules which appear to hamper the administration of justice in jury trials. Every practicing lawyer realizes the basic inconsistency in our jury treatment. First, we treat jurors as men endowed with superhuman ability to control their emotions and intellect. Then, we treat them as low-grade morons, not to be trusted with receiving certain evidence because they would be misled thereby.

The lectures illustrate some obstruction to adequate trial preparation, created by orthodox rules of pleading and discovery, something the Federal Rules of Procedure and our Practice Act are attempting to overcome. The goal still remains, that of bringing out into the open, before trial, a full disclosure and presentation of the factual elements on which the parties are relying for their respective charges and defenses.

The lectures illustrate conflicts concerning the basis of the doctrine of judicial notice, and the dangers of confusion with presumptions. The generally recognized rule on judicial notice is that there are some facts which may, but need not be judicially noticed. Yet the rule fails to serve its goal. For example, under our system of litigation, a party has no right to complain of error if he was responsible for inducing it or failed to take measures to prevent it; or the *personal* knowledge of the judge, jurors or counsel may not be co-extensive with the *judicial* knowledge of the judge; or whether or not the truth of a given proposition is disputable may itself be the subject of dispute among reasonable men. Also, statutory differences and variations in local conditions of understanding and knowledge make the general rule unsettled. The hope remains that with proper safeguards, judicial notice can fulfill its chief objective: the elimination of issues as to which there is or can be no bonafide dispute.

Existing uncertainties as to distribution of trial functions between judge and jury, are illustrated by the looseness of decisions respecting questions preliminary to the admissibility of evidence, and the barriers erected by the hearsay and other exclusionary rules, which bar otherwise relevant and persuasive evidence from the jury. There remains tremendous conflict in distinguishing between and allocating the burden of evidence and the burden of persuasion. As Professor Morgan points out, the charge to the jury in a civil case that a fact is proved

by the preponderance of the evidence, or to a jury in a criminal case that the issue is proved unless a reasonable doubt exists, leaves the verdict largely within the realm of conjecture.

The hearsay rule itself presents the greatest obstacle to complete factual presentation to a jury, and the author urges much greater liberality in its treatment than our courts have dared to allow, even with the numerous exceptions to the rule.

Attaining a simplified procedure by which controversies may be adjusted with reasonable speed and without undue expense remains the sought-for goal.

COURTS OF INJUSTICE. The Failure of Justice in the State Courts, by I. P. Callison. Twayne Publishers, 775 pp. $6.00.

Reviewed by MORRIS K. LEVINSON

Morris K. Levinson, a past president of The Decalogue Society, is a member of The Board of Governors of The City Club of Chicago.

This is an angry book, written by an angry man—a newspaper man. That his anger is justified in certain individual court cases wherein there has been a failure of justice, and in certain fields of legal practice, cannot be gainsaid; and his thesis that such practices should be abolished or reformed, is praisworthy.

But his purpose is ill-served when he devotes over 700 pages of his book to most violent and uncritical abuse of most, if not all, lawyers and state court judges.

"The legal profession, like the gates of hell, is open to all comers," and, "the debauched professsion," and, a chapter on "Is the Lawyer Necessary," are mild samples of his style of reform. Other samples are statements to the effect "that court practitioners are admittedly the most expensive and the most completely parasitic class known to American history;" "the less capable members of the legal profession are judges:" and comments on the ignorance of Coke, Blackstone and Marshall; and that the creators of the American Constitution are idols with feet of clay.

"We must face the indisputable fact that the matter with the administration of the law is the lawyer. You may reform till doomsday, but until you entirely eliminate the lawyer from the courts of justice, or subject him to rigid limitations in numbers and rigid control in his capacity as an officer of the court, you will accomplish little."

His outbursts of scorn upon the pettifoggers, the shysters, the hyena-like cross-examiners, who reduce to tears the efforts of modest virgins who are prevented from telling their stories in court, the lawyer-criminals and the criminal-lawyers, the bankruptcy ringers, and the lawyer "caretakers" of the wealthy, are so hysterically set forth, as to defeat the author's well meant intent.

The author is also violently opposed to the jury system, not only because these terrible lawyers can wind jurors round their little fingers, but because state court judges have surrendered their power to comment on the evidence, whereas, the Federal judges do have that power. He also is adamant against the popular election of state court judges for short terms, which puts them in the power of the political leaders, or "bosses;" against lawyer-legislators, who have taken away from the judges, the power of making court-rules, (which statement is not true in a great many states); against precedent law, which he proposes to wipe out in one fell swoop, as "the dead hand" which obstructs every new generation's progress.

Mr. Callison is in favor of the British, French and Canadian systems of law and justice, of a limited number of well-trained members of the bar, of complete domination of the judge over the court-room and all its activities, and in favor of a public defender system in this country as well as all the commissions possible, staffed by lay-men to handle various classifiable branches of jurisprudence, such as commercial disputes and automobile claims for injuries. He would also abolish the rancid smells in all police station court-rooms, such as the old Harrison Street police district in Chicago. But that was abolished some thirty years ago, under a modernization plan, but, sadly enough, the newly located Madison Street denizens still smell.

Fact is, most of the authorities and quotations used by the author, are of the vintage of the early part of the century. Little mention is made of the progress made in the field of judicial reform in the last two decades. The New Jersey plan is given enthusiastic praise, but no mention is made of the efforts in many of the states to adopt similar plans. Very limited mention is made of the devoted work of bar associations thruout the country to improve standards, of the work of the American Law Institute to re-state the law and to codify and make uniform many of our statutes, of the Judicial Councils to help the legislative process, and certainly nothing is said of the liberalization of the law and the adoption of more equitable principles in the opinions of state and U.S. Supreme Court and trial court judges.

That grave abuses exist in the judicial system may be admitted. Our author bewails the fact that there is no "science of the law." He wishes to abolish all the rules of evidence and discard all rules of procedure. May he be reminded that Hitler and Stalin did just that, as well as the banishment of all lawyers. That is the road to dictatorship.

It sounds so beautifully simple: Let each witness tell his story in his own way without constant and technical objections by these terrible lawyers. Let a "scientific" tryer of facts, well trained for that purpose, decide all issues, and thus "justice" will be done.

"Among all functions, there is but one Godlike, to judge," says Maxwell Anderson, in "Winterset." There it is, Mr. Callison. The law is a growth arising out of experience and living.

How do you feel about the Sacco-Vanzetti case? The Scottsboro cases? The American Civil Liberties Union?

What about the many lawyers who have fought in the courts for freedom of the press, freedom of religious thought, freedom of speech and all our other liberties? Who has led the fight against McCarthyism, in the courts and elsewhere?

Many of us think the jury system is the palladium of our liberties and that juries, as well as state court judges, will recognize at sight, the antics of a shyster or shady lawyer, and mete out to him and to his client, the sort of exact and equal justice to which they are entitled.

Many of us hold in abhorrence, the French judicial system, which casts upon the defendant the duty of proving himself innocent, and we fear the British system, where a litigant may be ruined by the terrifically high set of court costs, if he loses his case; as well as the necessity of hiring both a solicitor and a barrister to handle each piece of litigation.

Yes, the lawyers over there are more suave. But so are their authors and critics—and, their criticisms of their judicial systems and their court officers are made in less strident language, with ancient abuses forgotten, with villification absent and briefly and compactly presented, as in a proper lawyer's brief. More reforms here might thereby be accomplished. But "remove not (all) the ancient landmarks thy fathers have set."

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